No.

In the Supreme Court of the United States

October Term, 1956

ON WRIT OF

INDEX

CITATIONS

Cases—Continued

Statutes and Regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 596

UNITED STATES OF AMERICA, PETITIONER

v.

WALTER KORPAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 111–118) is reported at 237 F. 2d 676.

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1956 (R. 119). On October 26, 1956, by order of Mr. Justice Burton (R. 119–120), the time for filing a petition for a writ of certiorari was extended to November 27, 1956, and the petition was filed on that date. The petition was granted on January 21, 1957 (R. 120). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a mechanical game, the operation of which involves the element of chance as the result of which the player may become entitled either to free plays or to money, is the type of gaming device which is subject to the tax imposed upon "so-called 'slot' machines" as that term is used in 26 U. S. C. (Supp. III) 4462 (a) (2).

STATUTES AND REGULATIONS INVOLVED

The Internal Revenue Code of 1954, 26 U. S. C., Supp. III, provides in pertinent part:

> SEC. 4461. IMPOSITION OF TAX.
>
> There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:
>
> (1) $10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);
>
> (2) $250 a year, in the case of a device defined in paragraph (2) of section 4462 (a); and
>
> (3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. * * *
>
> SEC. 4462. DEFINITION OF COIN-OPERATED AMUSEMENT OR GAMING DEVICE.
>
> (a) *In general.*—As used in sections 4461 to 4463, inclusive, the term "coin-operated amusement or gaming device" means—
>
> (1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and
>
> (2) so-called "slot" machines which operate by means of insertion of a coin, token, or sim-

lar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

(b) *Exclusion.*—The term "coin-operated amusement or gaming device" does not include bona fide vending machines in which are not incorporated gaming or amusement features.

(c) *1-cent vending machine.*—For purposes of sections 4461 to 4463, inclusive, a vending machine operated by means of the insertion of a 1-cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, or entitles a person to receive a prize of a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens, shall be classified under paragraph (1) and not under paragraph (2) of subsection (a).

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any * * * tax * * * who willfully fails to pay such * * * tax * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

The Slot Machine (Johnson) Act, 64 Stat. 1134, 15 U. S. C. 1171, provides:

As used in this Act—

(a) The term "gambling device" means

(1) any so-called "slot machine" or any

other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; * * *.

Treasury Regulation 59, Section 323.22, as amended by T. D. 5203, 7 F. R. 10835, Dec. 22, 1942 (26 C. F. R. (1949 ed.) 323.22 (b)), provides:

* * * * *

Examples of machines which, when operated by means of the insertion of a coin, token, or similar object, are regarded as gaming devices for purposes of these regulations are:

(a) A "pin-ball" machine with respect to which unused "free plays" are redeemed in cash, tokens, or merchandise, or with respect to which prizes are offered to any person for the attainment of designated scores.

(b) A machine which, even though it does not dispense cash or tokens, has incorporated gaming features in the form of combinations of insignia on reels or drums.

STATEMENT

An indictment (R. 3) returned in the United States District Court for the Northern District of Illinois charged that during August 1955, the respondent maintained on his premises, known as Korpan's Landing, in Fox Lake, Illinois, certain coin-operated gaming devices as defined by 26 U. S. C. 4462 (a) (2) (*supra*, p. 2); that by reason of this act he became obligated to pay the $250 special occupational tax on such devices imposed by 26 U. S. C. 4461 (2) (*supra*, p. 2); and that he willfully and unlawfully failed to pay such tax in violation of 26 U. S. C. 7203 (*supra*, p. 3). Respondent, having waived jury trial (R. 4), was found guilty by the court and sentenced to pay a fine of $750 (R. 97). In convicting the respondent, the District Court found the machines were within the definition of Section 4462 (a) (2).

On appeal (R. 99–100), the Court of Appeals reversed, holding that the machines were not within Section 4462 (a) (2) even though they might be considered gaming devices since, in the court's view, the legislative history indicated "that Congress intended to exclude pinball machines from the category of gaming devices" (R. 116). The Court of Appeals regarded the Treasury Regulation, T. D. 5203 (*supra*, p. 4), under which the machines in question would be subject to the $250 tax, as inconsistent with the statute (R. 118).

Pertinent evidence adduced at the trial may be summarized as follows:

Petitioner had on his premises three bingo or pinball machines (Gov. Ex. 3, 4, 5), bearing the names

"Bally Hi-Fi", "Bally Gaiety", and "Bally Variety" (R. 23, 41). These machines, manufactured by the same company, are operated on essentially the same principles (R. 56). The game, played on an inclined table, is started by the player inserting a dime which releases the first of the five balls to be shot into the machine by the plunger (R. 25, 45, 56–57). The plunger is calibrated with six or seven scored lines so that the player may gauge the intensity of his shots (R. 57). There are 25 holes on the playing board, and the object of the game is to get the balls in such holes as will light up a series of numbers on the back of the machine in a vertical, horizontal, or diagonal line, similar to bingo (R. 25, 56–57). By inserting additional dimes, the player has a possibility of increasing the odds or obtaining additional balls before starting the game (R. 25, 26, 66, 68). There are "game features", affording methods of obtaining replays determined by electrical current over which the player has no control except by depositing coins which may or may not produce the hoped-for result (R. 59, 62, 68–69. The machine has a "reflex unit" which more or less balances out high winnings against small winnings (R. 50, 62–63). A player may nudge the machine to get the ball in a certain hole (R. 59, 74), but if he pushes too hard it will light up a sign indicating a "tilt", and the game ends with no return of money (R. 50–51). When replays are registered on the electrical scoreboard, the player may then play additional games free, or be reimbursed for them in cash by the proprietor (R. 32, 79). Inside the machine is a replay meter which registers whether the

replays are played or cancelled. If the proprietor pays a player in cash for games won, he presses a cancellation or "knock-off" button on the bottom of the machine which removes the games won from the scoreboard and registers them on the replay meter (R. 36, 37).

On June 16, 1955, Internal Revenue agents asked respondent to exhibit his special stamp tax covering the coin-operated devices on his premises for the fiscal year ending June 30, 1955, and respondent did so. When asked if he had paid winners on these machines in either cash, merchandise, premiums, or tokens, respondent denied that he had done so. The agent explained to respondent that, if the machines were used as gaming devices he would have to purchase a $250 stamp for each machine, and that, if he paid winners in cash or its equivalent without having purchased the stamps, he would be subject to civil and criminal penalties. Respondent indicated he understood all this (R. 15). The agent explained that the new fiscal year would begin on July 1, 1955, and that if on that date respondent had any gaming devices in operation on his premises he should file special stamp tax returns and pay $250 for each such device (R. 16). On June 22, 1955, respondent filed with the District Director of Internal Revenue a tax return (Gov. Ex. 1) for five coin-operated devices for amusement purposes only, upon which the tax was $10 for each for a $50 total, covering the period from July 1, 1955, through June 30, 1956 (R. 9, 10–11, 92).

On August 12, 1955, respondent paid $1.00 to Annette Veit for 10 replays and $1.20 to John Shannon,

an undercover Internal Revenue agent, for 12 replays (R. 19–20, 28–30). Respondent admitted to Shannon that he recalled the advice in June 1955 about the obligation to purchase coin-operated gaming device stamps prior to paying for replays won on such machines; that he had been paying winners on these machines at the time the agent spoke to him and ever since; and that he had of his own free will made the $1.00 and $1.20 payments for replays to Annette Veit and to Shannon (R. 30).

On September 21, 1955, respondent paid to the Internal Revenue Service $825, which included $750 covering the three machines at $250 each and a penalty of $75 for late payment of the tax (Gov. Ex. 2; R. 93, 52–53; 11–12).

SUMMARY OF ARGUMENT

I

The machines here involved come within the literal terms of 26 U. S. C. 4462 (a) (2) subjecting them to the higher $250 tax imposed by 26 U. S. C. 4461 (2). Section 4462 (a) (2) specifies three conditions under which a coin-operated "so-called 'slot' machine" is subject to the higher tax: (1) it must operate by insertion of a coin or similar object, (2) the application of the element of chance must be involved by virtue of which, (3) the machine must deliver, or entitle a winning player to receive, cash, premiums, merchandise or tokens. Respondent's machines fulfill these requirements.

1. It is undisputed that coins (dimes) have to be inserted in respondent's machines to begin the game,

for possible changing of odds, and for the receipt of additional balls.

2. A substantial element of chance is involved in operating respondent's machines—including the player's virtual lack of control over the ball after release of the plunger; absence of control over the selection of odds payable on winning sequences or added "game features"; and presence of the reflex unit assuring that the winnings paid will not be too great. Even the court below conceded that pinball machines "may well be conceded" to be "gaming devices or games of chance" (R. 117). Although it may be said that there was some slight degree of skill involved in the operation of respondent's machines, the chance element was clearly sufficient to categorize them as gaming devices. Cf. *Tooley* v. *United States*, 134 F. Supp. 162 (D. Nev.). A number of state decisions take the position that pinball machines, essentially similar to those here, are games of chance within gambling statutes, even though some element of skill may be present.

3. The evidence was undisputed that respondent had made cash payments to customers for free replays on his machines, and that he had admitted making such payments.

The error in the opinion below lies in its assumption that the use of the term "so-called 'slot' machines" in Section 4462 (a) (2) shows an intention to limit the section to a particular type of device, frequently colloquially referred to as a "one-armed bandit," even though the specific requirements set forth in the section are otherwise met. To the contrary, the use of

the word "so-called" before "slot machine" indicates that the word was intended to be generic, to cover coin-operated machines generally designed to be used or used for gambling purposes. Respondent's machines are really electronic descendants of the "one-armed bandits," and are completely different from pinball machines used solely for amusement purposes. They possess many features incorporated into the mechanism to be utilized for gambling purposes only. Moreover, since the true "one-armed bandits" dispense only coins (usually nickels, dimes, and quarters), if Congress had meant Section 4462(a) (2) to include only "one-armed bandits", there would have been no necessity for adding, after "cash", the words "premiums, merchandise, or tokens". If Congress had intended so to limit its coverage, Section 4462 (a), exempting penny vending machines (with gaming features) from the purview of Section 4462 (a) (2), would also have been unnecessary.

It was not essential in order that respondent's machines be considered "so-called 'slot' machines" that payment be made by delivery of coins from the machines themselves, in lieu of payment by the proprietor for free replays. Cf. *United States* v. *Ansani*, opinion dated January 15, 1957 (C. A. 7). Prior to the incorporation of the "so-called 'slot' machines" definition into the Revenue Act of 1941 (55 Stat. 723), state court decisions had held that pinball machines designed for gambling were slot machines within the meaning of local gambling statutes. With the results of this litigation in the public domain, it is reasonable to believe that Congress used the term "so-called" in

relation to slot machines to cover exactly the type of device that is here involved, a coin-operated machine designed for gambling but differing from older types in order to appear more respectable. Congress manifestly intended the three specific features it enumerated in the statute to be controlling in determining the amount of tax. As we have shown, those requirements are indisputably met here.

II.

The legislative history of 26 U. S. C. 4462 shows that Congress intended to tax pinball machines used for gambling, as distinguished from amusement purposes, at the heavier rate of $250. The opinion of the court below is largely based on its interpretation of legislative history as showing that the definition of "so-called 'slot' machines" in 26 U. S. C. 4462 (a) (2) was not intended to include any form of pinball machine. The court has interpreted some equivocal words in various congressional reports without considering the problem to which these reports relate. Consideration of the history which led up to the reports, as well as of the statute, demonstrates that Congress intended to draw a distinction, not between pinball machines *per se* and the slot machines known as "one-armed bandits", but between machines with the primary function of amusement (a category which includes many pinball machines) and machines with the primary function of acting as a gaming device (including pinball machines operated as were the devices in this case). This legislative history also shows that all

gaming devices were to be subject to the heavier $250 tax, whether they involved pins and balls or not.

1. The proposal to tax coin-operated machines was first made as part of the Revenue Act of 1941. The original bill, H. R. 5417, Section 555, defined coin-operated amusement and gaming devices as follows:

> (1) so-called "pin-ball" and other similar amusement machines operated by means of the insertion of a coin, token, or similar object, and
>
> (2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

As originally passed by the House, all coin-operated amusement or gaming devices would have been taxed at the same rate of $25 per annum. The Senate Finance Committee Report, S. Rep. 673, 77th Cong., 1st Sess., Part 1, pp. 21, 55, proposed a $10 per year tax upon "so-called pinball or other amusement devices operated by the insertion of a coin or token" and a $200 tax upon "so-called slot machines". The congressional debates show that the purpose of the amendment was to distinguish between gambling machines and pinball machines played purely for amusement, and to differentiate between machines on the basis of their usage, and not their name or method of operation (87 Cong. Rec. 7298, 7301, 6476). As modified, the bill passed on September 20, 1941. 55 Stat. 722.

2. At the hearings before the Committee on Ways and Means of the House of Representatives on Reve-

nue Revision of 1942, 77th Cong., 2d Sess., industry representatives urged that the taxing of penny candy machines as gambling devices resulted, by reason of their small revenue-producing qualities, in driving them from operation and in loss of revenue to the government (Hearings, vol. 2, pp. 2278–2280, 2057–2058; vol. 3, pp. 2682–2688). Another industry complaint was that the Treasury Department, since February 1942, was interpreting the classification of machines as amusement or gambling by usage, *i. e.*, by whether prizes were obtained thereby, rather than by the physical characteristics of the machines. It was suggested that machines should be taxed upon the basis of their physical characteristics, and not their usage in the field (Hearings, vol. 2, pp. 2056–2057). Similar industry complaints were made in the Related Hearings before the Senate Committee on Finance, 77th Cong., 2d Sess., on H. R. 7378 (Vol. 1, p. 1133, 1135–1141).

As finally passed on October 21, 1942 (56 Stat. 978), Section 3267 (h) dropped clause (1), referring to "so-called 'pin-ball' and other similar amusement machines, etc.," and substituted for it, "any amusement or music machine operated by means of the insertion of a coin, token, or similar object". The exemption for penny-vending machines, which the industry had advocated in the hearings, was granted under certain designated limitations. Despite the emphatic industry complaints, however, that the Treasury Department's interpretation of the "so-called 'slot' machines" definition was erroneously based on usage instead of the machine's physical characteristics, no change in the

law was made in this respect. The reasonable inference is that Congress, satisfied with Treasury's viewpoint, saw no need to amend the law.

3. The Treasury Department's interpretation of the "so-called 'slot' machines" definition as depending on whether premiums were returnable as a result of an element of chance was formally set forth in Regulations 59, Section 323.22, as amended by T. D. 5203, adopted December 22, 1942, and still in effect. The observation of the court below, that it could not "assume on the facts of this case that Congress considered T. D. 5203, as stating the true construction of Section 4462 when it is shown that only of late has the regulation been followed" (R. 148), is not correct. The Treasury Department in its rulings and enforcement policies has consistently adhered to T. D. 5203. The Department's position was publicized as early as 1942 in issues of "Billboard", the trade magazine of the coin-machine industry.

Congress was made aware of the Treasury Department's interpretation of the "'so-called 'slot' machines" provision, as including pinball machines in which cash payments were made for free replays, during the hearings on the 1954 Internal Revenue Code. Proposals were made to amend Section 3267 to "make it clear that pinball and amusement machines are clearly within the $10 classification", and that clause (b) (2) be amended so as to be identical "with the definition of a "gambling device" as used in the Johnson Act in describing what are colloquially known as "one-armed bandits" (Hearings before House Committee on Ways and Means, 83rd Cong., 1st

Sess., on General Revision of the Internal Revenue Code, Part 4, pp. 2510, 2511; Hearings before Senate Committee on Finance on H. R. 8300, 83rd Cong., 2d Sess., Part 4, pp. 1874–1879). Despite the explicit requests, however, of representatives of the pinball machine industry to amend the statute in the manner desired, Congress was not so persuaded. Again, the statute was reenacted without change in the pertinent definition of "so-called 'slot' machines". 68A Stat. 531. Since the administrative interpretation had been clearly and specifically pointed out to the congressional committees, this reenactment "bespeaks congressional approval". *Corn Products Refining Co. v. Commissioner*, 350 U. S. 46, 53; *United States v. Allen-Bradley Co.*, 352 U. S. 306, 310.

ARGUMENT

I

THE MACHINES HERE INVOLVED FALL WITHIN THE LITERAL TERMS OF "SO-CALLED 'SLOT' MACHINES" IN 26 U. S. C. 4462 (a) (2) AND ARE THEREFORE SUBJECT TO THE $250 TAX.

The machines here involved come within the literal terms of 26 U. S. C. 4462 (a) (2) (*supra*, p. 2) subjecting them to the higher $250 tax imposed by 26 U. S. C. 4461 (2) (*supra*, p. 2). Section 4462 (a) (2) specifies three requirements for a coin-operated gaming device to be a "so-called 'slot' machine": (1) it must operate by insertion of a coin or similar object, (2) the application of the element of chance must be involved by virtue of which, (3) the machine must deliver, or entitle the person playing or operating

the machine to receive cash, premiums, merchandise or tokens if he wins. There is no dispute as to the fact that the machines in question meet these three definitional elements although respondent does argue that a player's skill plays a part.

1. For the operation of respondent's machines, the insertion of a coin in a slot is necessary. Insertion of dimes is required to begin the game, for the possible changing of odds, and for the receipt of additional balls (R. 16, 20, 24, 25, 26, 27-28, 47, 57, 68-69, 77).

2. There is a substantial element of chance involved in the operation of respondent's machines. This includes the player's lack of control over the ball (excepting nudging the machine, which involves the risk of "tilting") after release of the plunger (R. 28, 48); complete absence of control over the selection of odds payable on winning sequences or added game features (R. 68-69, 71); and presence of the reflex unit assuring that the winnings paid will not be too great (R. 50). In the opinion of the government's expert witness, the possibility of winning was determined "predominantly by chance" (R. 51). The court below conceded that pinball machines "may well be conceded" to be "gaming devices or games of chance" (R. 117).

Although it may be said that there is some slight degree of skill involved in the operation of respondent's machines, the chance element is clearly sufficient to categorize them as gaming devices.[2] In *Tuohy* v.

---

[2] The observation in *Johnson* v. *Phinney*, 218 F. 2d 303, 307 (C. A. 5), that a pinball machine in some respects similar to respondent's, closely parallels the situation in the instant case, "No

United States, 134 F. Supp. 162 (D. Nev.); a machine, the operation of which consisted of attempts by the player to pick up with a boom and claw apparatus metal figurines entitling him to cash prizes, was held a "gaming device" within the predecessor of 26 U. S. C. 4462 (a) (2) and consequently subject to the higher $250 tax. Among its conclusions of law, the court held (134 F. Supp. at 167):

> The Court further concludes that the expression "by application of the element of chance" as used in said Section 3267 (b) (2) merely requires that there be a substantial element of chance involved in the play of the machine, and does not require that the element of chance predominate over the element of skill.

See also *United States* v. *21 Digger Merchandising Machines*, 202 F. 2d 647, 650 (C. A. 8), certiorari 345 U. S. 998; *United States* v. *10, More or Less, Digger Machines*, 109 F. Supp. 825, 827 (E. D. Mo.).

---

digital, lobstandard key who has studied a particular machine may attain a degree of proficiency in deciding the force to apply to the ball or in nudging the machine so that the ball is more likely to strike a particular bumper or fall into a particular hole; but even the most skillful player cannot predetermine conditions and odds which are completely beyond his judgment and control."

A number of state decisions take the position that pinball machines essentially similar to those in the instant case are considered games of chance within gambling statutes, even though some element of skill may be involved. *E. g.*, *Commonwealth* v. *Bowman*, 267 Ky. 662; *State ex rel. Hussmit* v. *Kilburn*, 111 Mont. 109; *Shapiro* v. *Moss*, 281 N. Y. S. 72, affirmed, 270 N. Y. 609; *People* v. *One Pinball Machine*, 316 Ill. App. 561; *Hoode* v. *City of Birmingham*, 229 Ala. 636, 639; *State* v. *Maine* v. *Livingston*, 135 Me. 323; cases in 135 A. L. R. 146. And see *United States* v. *10 Automatic Pay-off Pin-Ball Machines*, 113 F. Supp. 230 (W. D. La.), holding that pinball machines which had been used for gambling

3. There was clear compliance with the third prerequisite that the machine must deliver, or entitle the player to receive, cash, premiums, merchandise, or tokens. Two witnesses testified that respondent had paid them in cash for free replays won on the machines (R. 19–20, 28–30), and respondent admitted having made such payments (R. 30, 39, 42).

The basic error in the opinion below lies in its assumption that, even though the listed elements of Section 4462 (a) (2) were met, the use in that section of the term "so-called 'slot' machines" requires its application to be limited to "one-armed bandits", machines which clearly fall within the definition of a gambling device in the Slot Machine (Johnson) Act, 64 Stat. 1134, 15 U. S. C. 1171 (a), (*supra*, p. 3). This ruling misconceives both the structure of the statute and the nature of the machines at issue.

These machines are indisputably "slot machines" as the dictionary defines that term. Webster's New International Dictionary, 2nd ed., Unabridged, defines "slot machine" as simply "a machine the operation of which is started by dropping a coin into a slot." By qualifying the term "slot machine" by the three other factors we have just discussed, Congress made it clear that only coin-operated machines which were used for gambling were to be covered by the $250 tax, and not all coin-operated devices. The court below has read the statute as if the term "so-called

---

purposes before pay-off devices were removed were "designed and manufactured" as gambling devices within the Johnson Act prohibiting shipment of gambling devices in interstate commerce. See also *infra*, pp. 24–25.

'slot' machine" *narrowed* the category of machines subjected to the tax. We believe, on the contrary, that "so-called 'slot' machine" is broad—as the dictionary defines it—and that Congress added the three elements in order to restrict coverage to gambling devices. "So-called" is frequently used when one is referring to a term which may not be considered good literary style or accepted as the best English; "slot machine"—as meaning *any* coin-operated machine—may well fall into that class; Congress could therefore have employed "so-called" merely to indicate that it was using a colloquial or not-yet-standard phrase, and not at all for the purpose of designating a special and particular type of "slot machine," *i. e.*, a "one-armed bandit".

In adopting a limited interpretation of the section on the theory that the term "slot machine" refers to a particular type of slot machine, the court below also failed to give any weight to the addition of the words "so-called" as a means of avoiding a narrow trade use of the term in favor of a more general use. Webster's New International Dictionary, 2nd ed., defines "so-called" as "Commonly named; thus termed; * * *." Therefore, even if Congress was not using "slot machine" in its broad dictionary sense, the use of "so-called" would indicate an intention to give the term a general meaning rather than a limited technical meaning such as might be used by manufacturers or dealers. It might well have been added in an attempt to forestall the argument that the term "slot machine" has acquired a definite but restricted meaning.

There is internal evidence in other provisions of the section which support the conclusion that Congress intended the term to have a general interpretation. The "one-armed bandits" commonly seen in taverns, night clubs, bowling alleys, and beach resorts, dispense only coins (usually nickels, dimes, and quarters). If Congress had meant Section 4462 (a) (2) to include only "one-armed bandits", there would have been no necessity for adding, after "cash", the words "premiums, merchandise, or tokens". Additionally, if Congress had entertained such an intention, the provision in Section 4462 (c) exempting penny-vending machines (with gaming features) from the purview of Section 4462 (a) (2) would have been entirely unnecessary. Penny-vending machines are clearly not "one-armed bandits".

The use of the word "so-called" in this context shows that Congress intended to include machines of the type here involved; machines adapted for, and used for, gambling. Indeed, these machines not only meet the three gambling elements we have discussed, but have within them the elements of standard "one-armed bandits," namely, rotating reels. (R. 69–70), so that they may well be said to be slot machines under the Johnson Act. See *infra*, pp. 21–23. At the very least, they certainly fall within the class of "so-called 'slot' machines" in Section 4462 (a) (2), *i. e.*, machines adopted for and used for gambling which embody the three elements discussed above.

There is a vast difference between the machines here involved and a pinball machine really designed only for amusement purposes. Respondent's expert wit-

ness, Breither, did not even refer to the machines as pinball machines but stated that the generic term for them was "in-line games" and "bingo machines" (R. 80). He admitted that the odds-selecting rotary device on respondent's machines, except for the wire connections with the main device, was the same basic thing as a "one-armed bandit." (R. 69, 70). Respondent's machines are really electronic descendants of "one-armed bandits." Unlike amusement pinball machines, these devices have a replay meter inside to register replays, and a "knock-off" button to remove games won from the scoreboard on payment of cash and register them on the replay meter as though played (R. 47, 36, 37); a rotary device for determining the odds and game features which light up on the front of the machine (R. 67–68, 69); game features to afford additional chances of winning (R. 68, 69); a possibility of increasing the odds by depositing additional coins (R. 48, 66, 68); and a reflex unit to balance out high winnings against small winnings, and to vary the condition of the game features (R. 50, 62–63). All of these characteristics of respondent's machines are not present on regular amusement pinball devices, and were patently designed for only one purpose—gambling. None of these features has any relation to the pinball amusement aspects of the machine. The machines are therefore much closer to "one-armed bandits" than to pinball machines. They can properly be characterized as slot machines camouflaged as pinball machines.

The gambling features are so integral a part of these machines that we think they may well fall within

the definition of the Johnson Act, *supra*, p. 3. They have drums or reels with insignia thereon for scoring replays which are sufficiently an essential part of the machine to come within the definition of that Act. Even under the Johnson Act, it is not necessary that payments be made by delivery of coins from the machines themselves, in lieu of payment by the proprietor for free replays. Compare *United States* v. *Ansani*, opinion dated January 15, 1957 (C. A. 7), pending on petition for certiorari, No. 813, this Term, which involved illegal shipment in interstate commerce in violation of the Slot Machine (Johnson) Act (*supra*, p. 3) of a remote control device called a "trade booster" to be used in connection with regular slot machines. The court stated at page 3 of the slip opinion:

> Defendants contend that a trade booster transforms a slot machine into a nongambling device for amusement only. They argue that after the slot machine has been altered in such a way that its slot is so obstructed as to prevent the insertion of a coin to activate it, and its pay off mechanism has been removed, it is no longer a slot machine; and, therefore, a trade booster is not a subassembly or essential part of a slot machine. The difficulty with this argument is that it dwells on nonessentials and completely ignores the fact that after the trade booster is attached, the machine performs precisely the same function as an unconverted slot machine, *i. e.*, it is a machine or device "an essential part of which is a drum or reel with insignia thereon * * * by the operation of which a person may become entitled to receive, as the result of the application of an element of

> chance, any money or property * * *." Section 1171 does not require that a slot machine be a coin activated device nor that winnings be delivered automatically. The statute is clear on these points for "gambling device" is defined as "any so-called 'slot machine' *or any other machine or mechanical device* * * * by the operation of which a person *may become entitled* * * *." A slot machine is not a gambling device merely because it has coin slots or an automatic pay-off mechanism. It is a gambling device because its function and design are to allow one to stake money or any other thing of value upon the uncertain event of achieving the winning combination of insignia.

See also *State* v. *Ricciardi*, 32 N. J. Super. 204, 208 (1954), for the view that a pinball machine which recorded free games on which cash pay-offs were made was a "slot machine or device in the nature of a slot machine" under a New Jersey statute making maintenance of such a device a misdemeanor. Accord, *Stafford* v. *Garrett*, 128 N. J. L. 623 (1942). But whatever the resolution of that question under the Johnson Act,[1] the relationship between these machines

[1] The definition of the Johnson Act is not controlling in relation to the statute here involved since the history and purposes of the two statutes are different. The objective of the Johnson Act is to place an outright ban on shipment of the machines in interstate commerce, except to states which permit them. The aim of the instant statute is to raise revenue, as well as to discourage gambling. Congress could well have decided not to use its drastic power under the Johnson Act to prohibit machines of the kind used here from being shipped in interstate commerce while nevertheless regarding the machines as entirely capable of paying the higher tax which it imposed on gambling (as distinguished from amusement) devices.

and the admitted slot machines is clearly close enough to render them "so-called 'slot' machines" under Section 4462 (a) (2), as distinguished from true amusement devices taxed under Section 4462 (a) (1).

Prior to the time when the "so-called 'slot' machine" definition was first incorporated in the Revenue Act of 1941 (September 20, 1941; 55 Stat. 723), state court decisions had held that pinball machines used for gambling were "slot machines" within the meaning of local gambling statutes. In *Times Amusement Corp.* v. *Moss*, 160 Misc. 930, 290 N. Y. S. 794, affirmed, 247 App. Div. 771, 287 N. Y. S. 327 (1936), pinball machines made ready for operation by inserting a coin in a slot, and involving playing for prizes, were held to be machines having an element of chance in the determination of the outcome of their operation under a statute prohibiting slot machines in which the operation is unpredictable because of any element of chance. Accord, *People* v. *Gargiulo*, 298 N. Y. S. 951, 164 Misc. 39 (1937); *In re Mapakarakos*, 8 N. Y. S. 2d 826, 169 Misc. 766 (1938); *People* v. *Traver*, 11 N. Y. S. 2d 588, 171 Misc. 53 (1939).[1] In *State* v. *Coats*, 158 Ore. 122 (1938), a pinball machine was held to be a lottery under an Oregon gambling statute. The object of the game was to get the ball in one of eighteen holes. If successful, the player received an award greater than the nickel paid for playing, but if

[1] New York cases of the same tenor subsequent to 1941 are *People* v. *Ritter*, 32 N. Y. S. 2d 176 (1942); *Savoy Vending Co., Inc.* v. *Valentine*, 33 N. Y. S. 2d 324, 178 Misc. 1 (1942); *People* v. *Fitzgibbons*, 33 N. Y. S. 2d 377 (1942); *People* v. *Whitcomb*, 79 N. Y. S. 2d 230, 273 App. Div. 610 (1948).

unsuccessful he received nothing. The court observed (at p. 133): "In our opinion, the pinball machine described in the information is a type or form of *slot machine* and must be judged by the law applicable to it" (emphasis added). In *Ex parte Davis*, 66 Okl. Crim. App. 271 (1939), and *Couch v. State*, 71 Okl. Crim. App. 223 (1941), pinball machines were held to be slot machines under an Oklahoma gambling statute.[8] Other state cases decided prior to the Reyenue Act of 1941 had shown no hesitancy in viewing pinball machines as gambling devices within gambling statutes and ordinances. *E. g., Commonwealth v. Bowman*, 267 Ky. 602 (1936); *Milwaukee v. Bross*, 225 Wisc. 296 (1937); *Speed v. Keys*, 110 S. W. 2d 1245 (Tex. Civ. App. 1937); *State of Maine v. Livingston*, 135 Me. 323 (1938); *State ex rel. Hassett v. Kilburn*, 111 Mont. 400 (1941); and see *Holladay v. Governor of State of South Carolina*, 78 F. Supp. 918, 924-925 (W. D. S. Car., 1948), affirmed, 335 U. S. 803.

This line of decisions, indicating a constant attempt by the industry to camouflage machines used for gambling as amusement devices and a constant refusal by the courts thus to permit evasion of gambling statutes, was presumably known to the committees in Congress concerned with this problem. Both state legislatures and courts had called the machines "slot machines." This tends to support the view that the language "so-called 'free' machines" was written into the federal

[8] For similar Oklahoma cases subsequent to 1941, see *Pollock v. State*, 200 P. 2d 457, rehearing denied, 201 P. 2d 798 (Okl. Crim. App. 1949); *Skelton v. State*, 220 P. 2d 846 (Okl. Crim. App. 1950).

statute to cover the situation of these gambling machines camouflaged as amusement devices. Since the machines here involved meet the three additional conditions set forth in the section, they should have been held taxable under Section 4462 (a) (2).

II

THE LEGISLATIVE HISTORY OF 26 U. S. C. 4462 SHOWS THAT CONGRESS INTENDED TO TAX PINBALL MACHINES USED FOR GAMBLING, AS DISTINGUISHED FROM AMUSEMENT PURPOSES, AT THE HIGHER RATE OF $250.

The legislative history of 26 U. S. C. 4462 (*supra*, p. 2) shows that Congress intended to tax pinball machines used for gambling, as distinguished from amusement purposes, at the heavier rate of $250. The opinion of the court below is largely based on its interpretation of legislative history as showing that the definition of "so-called 'slot' machines" in 26 U. S. C. 4462 (a) (2) was not intended to include any form of pinball machine—even though the particular pinball machines might be within the literal terms of the statute, as we have developed in Point I, *supra*. The court has interpreted some equivocal words in various congressional reports without considering the problem to which these reports relate. Consideration of the history which led up to the reports, as well as of the statute, demonstrates that Congress intended to draw a distinction, not between pinball machines *per se* and the slot machines known as "one-armed bandits", but between machines with the primary function of amusement (a category which includes many pinball machines) and machines with the primary

function of acting as a gaming device (including pin-ball machines operated as were the devices in this case). This legislative history also shows that all coin-operated gaming devices were to be subject to the heavier $250 tax.

1. The proposal to tax coin-operated machines was first made as part of the Revenue Act of 1941, and as originally passed by the House of Representatives would merely have taxed all coin-operated amusement or gaming devices at the same rate of $25 per annum. The House Committee on Ways and Means Report, No. 1040, accompanying H. R. 5417, 77th Cong., 1st Sess., p. 60, stated: "'Coin-operated amusement or gaming devices' are, briefly, machines which fall within the general classification colloquially referred to as 'pin ball' machines and 'slot machines'". The original bill, H. R. 5417, Section 555, defined coin-operated amusement and gaming devices as follows:

> (1) so-called "pin-ball" and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object, and
>
> (2) so called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens.

Under this act, no occasion would have arisen to distinguish between gambling devices and the ordinary pinball machine, since the tax was the same.

The Senate Finance Committee Report, S. Rep. 673, 77th Cong., 1st. Sess., Part 1, p. 21, 55, proposed a $10 per year tax upon "so-called pinball or other

amusement devices operated by the insertion of a coin or token" and a $200 tax upon "so-called slot machines". Senator Clark of Missouri, the author of the amendment, stated (87 Cong. Rec. 7298):

> The amendment came about * * * by reason of the fact that upon the recommendation of the Treasury Department the House Ways and Means Committee went into a new field of * * * taxation of slot machines, and proposed a levy of a flat tax of $25 a year on all classes of slot machines, including the little pinball machines into the slot of which a man puts a nickel without any hope of recompense, without any premium, but merely to try his skill on such a machine, to see how many balls he can put past the various pins. A tax was also imposed on the various machines with which a man tries to play a baseball game, a football game, or some other kind of game, without any gambling element connected with it. But at the same rate the Ways and Means Committee included the so-called one-armed bandits, which are notoriously a racket. I refer to the machines with the lemons, plums, oranges, and what-not, which are notoriously gambling machines. Such machines were put in the same category in the tax bill.
>
> * * * * * *
>
> Mr. President, it seemed to me and to a majority of the members of the Finance Committee that it was a disgrace to put all slot machines in the same class. Therefore we reduced the tax on the innocent slot machines, the ones which do not involve any gambling interest, from $25 to $10.

This statement indicates a purpose to distinguish between gambling machines and pinball machines played purely for amusement and to test the operator's skill. The following colloquy makes clear the intent to differentiate between machines on the basis of their usage, and not their name or method of operation (87 Cong. Rec. 7301):

Mr. CLARK of Missouri. The definition is perfectly plain. In lines 5 and 6 is this provision:

(1) $10 per year in the case of a device defined in clause (1) of subsection (b):

Subsection (b) reads in part:

Definition: As used in this part, the term "coin-operated amusement and gaming devices" means (1) so-called pin-ball and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object.

Referring now to line 17:

(2) so-called slot machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

Mr. President, clause 2 of subparagraph (b) *certainly takes out from the operation of clause (1) any machine which returns any sort of a premium, and that was the intention of the amendment, and it was the intention of the committee in adopting it.*

Mr. BARKLEY. Mr. President, let me ask the Senator a question.

Mr. CLARK of Missouri. I shall be glad to answer, if the Senator from Nevada will yield.

Mr. MCCARRAN. I yield.

Mr. BARKLEY. It refers to a "coin-operated amusement or gaming device", and under clause No. 1 it is still necessary to put in a coin in order to operate the machine.

Mr. CLARK of Missouri. There is no question about that.

Mr. BARKLEY. What does one get for the coin?

Mr. CLARK of Missouri. He does not get anything except the pleasure of playing the game.

Mr. BARKLEY. He has the pleasure of putting the coin in without the chance of getting anything back?

Mr. CLARK of Missouri. Yes.

Mr. BARKLEY. Under clause 2 there is a chance to get something back. That is the difference?

Mr. CLARK of Missouri. That is the difference between any sort of an ordinary amusement, for instance, riding on a chute-the-chute and playing the roulette wheel. The Senator has stated the difference just as well as it could be stated.

Mr. BARKLEY. In the case of the roulette wheel, I do not think there is a chance of getting anything back.

Mr. CLARK of Missouri. Nor do I, but very few people play the roulette wheel without the hope of getting something back. The Senator from Kentucky has precisely stated the difference between amusement and gambling, as well as it could possibly be stated by a corps of experts after months of testimony. [Emphasis added.]

See also 87 Cong. Rec. 7303–7304.

In the House debate, Congressman Treadway, after referring to the definition of coin-operated amusement or gaming devices, stated (87 Cong. Rec. 6476): "In other words, it is the gambling outfit we are trying to hit. * * * This particular paragraph would only apply where the person putting the money in the slot gets something in return, either money, a prize, or something else, as a gambling proposition."

The conferererence report of H. R. 5417 (H. Rep. 1203, 77th Cong., 1st Sess., p. 18) describes the final bill as follows:

> Amendment No. 147: The House bill imposed an occupational tax of $25 per annum with respect to the operation of a pin-ball game, a slot machine, or similar amusement or gaming device. The [Senate] amendment establishes two different rates of tax; $10 per annum in the case of a pin-ball game, or similar game or amusement machine, and $50 with respect to so-called slot machines, the operation of which involves an element of chance; and the House recedes.

Thus, although the terms "pinball" and "slot machines" were carried over from the House bill, the purpose was to classify as pinball machines devices used purely for amusement purposes, and to place in a different tax category other pinball machines used (as were the respondent's machines) for gambling purposes involving the element of chance. As modified, the bill passed on September 20, 1941. 55 Stat. 722.

2. In the spring of 1942, at the Hearings before the Committee on Ways and Means of the House of

Representatives on Revenue Revision of 1942, 77th Cong., 2d Sess., various industry spokesmen voiced objections to the tax laws regarding coin-operated machines. A recurring complaint was that offered on behalf of the penny-candy machines, which dispensed additional merchandise prizes by chance. It was urged that the taxing of these as gambling devices resulted, by reason of their small revenue-producing qualities, in driving them from operation and in loss of revenue to the government (Hearings, vol. 2, pp. 2278–2280, 2057–2058; vol. 3, 2682–2688). Another complaint was that the Treasury Department, since February 1942, was interpreting the classification of machines as amusement or gambling by usage, *i. e.*, by whether prizes were obtained thereby, rather than by the physical characteristics of the machines. One industry representative suggested (Hearings, vol. 2, pp. 2056–2057):

> Machines should be taxed on the basis of their physical characteristics and not upon the basis of their usage in the field.
>
> * * * if the tax is to be determined from a usage basis rather than from the physical properties of the game itself, the Government and the Internal Revenue Department are going to be involved in a policing problem rather than the collection of revenue. * * * I believe that the law was written not with the view of policing the morals of our people, but strictly on a revenue-raising basis. Moreover, our various States have conflicting statutes as to what is or shall be construed as gaming. I, therefore, urge that the raising of revenue from this in-

> dustry can be accomplished successfully and without confusion on the basis of taxing the machine for its physical properties regardless of its usage.

At the related Hearings before the Committee on Finance, United States Senate, 77th Cong., 2d Sess., on H. R. 7378, similar complaints were made as to the inequities of so construing the tax laws that the operators of penny-vending machines would be driven out of business (Vol. 1, pp. 1135–1141). Regarding the proposal to tax machines according to their physical characteristics rather than their usage, a representative of the coin machine manufacturers made this significant statement (Vol. 1, p. 1133):

> I appear before you with regard to the proposed section 617 relating to coin-operated amusement and gaming devices. * * * As the present tax provision now exists and even as amended to section 617, coin-operated devices are classified according to usage instead of the more simpler [*sic*] and fairer method of being classified according to their physical characteristics.
>
> Taxing by usage creates both loopholes and a policing problem for the Internal Revenue Bureau. Such a method also puts a premium on tax evasion, whereas, taxing on the physical characteristics of each machine is direct, definite and leaves no room for differences of opinion as to tax classification.

This industry spokesman also observed, "The taxing provisions as they now stand attempt to make a distinction between games of chance and games of pure

amusement, but make no distinction as to the degree of chance which in turn affects the ability of the machine to pay the tax imposed" (Vol. 1, p. 1134).

As finally passed on October 21, 1942 (56 Stat. 978), Section 3267 (b) dropped clause (1) referring to "so-called 'pin-ball' and other similar amusement machines, etc.," and substituted for it, "any amusement or music machine operated by means of the insertion of a coin, token, or similar object", in order to enlarge the category of machines subject to taxation.[6] The tax rate on gambling devices was increased from $50 to $100. The exemption for penny-vending machines, which the industry had advocated in the hearings, was granted under certain designated limitations. However, despite the emphatic industry complaints that the Treasury Department's interpretation of the "so-called 'slot' machines" definition was erroneously based on usage instead of the machine's physical characteristics, no change in the law was made in this respect. The reasonable conclusion to be drawn is that Congress, satisfied with Treasury's viewpoint, saw no need to amend the law.

3. The Treasury Department's interpretation of the "so-called 'slot' machines" definition as dependent on

---

[6] H. Rep. 2333, 77th Cong., 2d Sess., p. 180, referring to Section 617 of H. R. 7378, states: "This section amends section 3267 of the Code by defining the term 'coin-operated amusement devices' to include all amusement machines and music machines operated by means of the insertion of coins, tokens, or similar objects. Under this amendment there will be included in addition to pin-ball machines a great variety of other machines, such as baseball and football games, machine-gun games, music machines (so-called juke boxes), and many other types of coin-operated games."

whether premiums are returnable as a result of an element of chance was formally set forth in Regulations 59, Section 323.22, as amended by T. D. 5203, adopted December 22, 1942 (*supra*, p. 4). This regulation is still in effect under Section 7807 of the 1954 Internal Revenue Code. The observation of the court below, that it could not "assume on the facts of this case that Congress considered T. D. 5203, as stating the true construction of Section 4462 when it is shown that only of late has the regulation been followed" (R. 118), is not correct.[7] The regulation has been in force for over fourteen years and has been consistently followed during that entire time.

In the special-tax return Forms 11-B (Revised March 1947 and Feb. 1952; Def. Ex. 1, 2; R. 94, 95), the blanks for payment of the higher tax on both forms refer to "Coin-operated GAMING DEVICES (slot machines and *all other machines involving element of chance*)" (emphasis added). This language gives notice to persons required to purchase such stamps that the Internal Revenue Service does not in-

[7] So far as we can ascertain, the only basis for this assertion was a reference by respondent in his brief below at page 41 to an inconsistent interpretation in 1951 by a Collector of Internal Revenue at Indianapolis. This appears to be an isolated and mistaken interpretation entirely inconsistent with the rulings being issued from the Commissioner's office both to Collectors and taxpayers. Insofar as a search of the files shows, T. D. 5203 has been consistently followed by the Commissioner from the date of its issuance. The respondent can gain no support from interpretations, which he also cites in his brief below at pages 42–43, dealing with prizes paid to winning competitors in games of skill. Nor would a weekly prize for a high score on a pinball machine be comparable to the use made of the machines here.

terpret the gaming machine license tax as limited to certain types of machines; rather, it embraces all coin-operated machines involving the element of chance, including, of course, pinball machines used for gambling purposes.[8]

It is also significant that, as early as 1942, issues of the magazine "Billboard", the trade publication of the coin machine industry, made pinball machine owners aware of the Treasury Department position. For instance, in the issue of July 11, 1942, the following appeared:

> The federal tax situation was made more serious for locations and operators by the fact that Internal Revenue collectors began to enforce on a much larger scale the increased fee on free-play games in which the free plays were redeemed over the counter. This collection of $50 on such games compelled operators to think seriously about the coming year. Many reports indicated that a lot of free-play games would be removed from locations if they had to pay a $50 tax.

And in the issue of October 10, 1942, this statement was made, in speaking of pending legislation before the Senate:

---

[8] On Def. Ex. 1 is a reference to "Coin-operated AMUSEMENT DEVICES (pinball and all other amusement or music machines)", requiring the $10 tax. On Def. Ex. 2, the word "pinball" is deleted and the matter in parentheses has been changed to read "any amusement or music machines" (this change had been previously made in Form 11-B in September 1950). The revision is of no particular significance. Even after the change, a pinball machine used solely for amusement (as distinguished from one involving the element of chance or gambling) would be an "amusement" machine subject only to the lower $10 tax.

> Reports indicated that the Internal Revenue Bureau had refused to change its very adverse ruling that free-play games must pay a $50 tax when the location redeems free plays. This is one of the most serious points at issue, and the penny counter gaming device is the second point at issue. The free play question seemed to surmount all other issues.

4. Congress was made aware of the Treasury Department's interpretation of the "so-called 'slot' machines" provision, as including pinball machines in which cash payments were made for free replays, during the hearings on the 1954 Internal Revenue Code. At that time, an industry representative (Hearings before House Committee on Ways and Means, 83rd Cong., 1st Sess., on General Revision of the Internal Revenue Code, Part 4, pp. 2505–2522) stated that, under the legislative history of the existing statute, pinball machines were not taxable in the same category as slot machines (*id.*, p. 2506); that the tax was upon the machines themselves and not upon the use to which they were put (*id.*, pp. 2507–2508); that a $250 federal tax on pinball machines would virtually drive their operators out of business,[9] and interfere

[9] Collection of the higher $250 tax on pinball machines used as gaming devices has not driven their owners out of business, as predicted by industry spokesmen. We have been advised by a memorandum of October 12, 1956, from the Assistant Commissioner (Operations) of Internal Revenue that in the fiscal year 1956 the receipts from pinball machines used as gaming devices amounted to an estimated $3,500,000. This memorandum further advises that, if the decision of the court below is affirmed, this annual revenue of $3,500,000 will be lost; that refund claims totaling that amount or more may be anticipated; and that approximately 500 pinball machines seized will have to be returned.

with local governments' need for further revenue (*id.*, pp. 2509–2510). He proposed an amendment to Section 3267 to "make it clear that pinball and amusement machines are clearly within the $10 classification", and that clause (b) (2) be amended so as to be identical with the definition of a "gambling device" as used in the Slot Machine (Johnson) Act, 64 Stat. 1134, 15 U. S. C. 1171 (*supra*, p. 3), in describing "one-armed bandits" (*id.*, pp. 2510, 2511). This was the hearing at which Congressman Eberharter, in speaking of the legislative history of Section 3267, stated, "What we intended was to tax one-armed bandits $250" (*id.*, p. 2517). At this same hearing, however, Congressman Byrnes observed (*id.*, p. 2520): "I can see also, though, where even if you take the perfectly innocent pinball machine and the manager turns it into a gambling device, which he can do, if that is what he is using it for, I presume he should pay the tax on the same basis as the other gambling machines that he has." Congressman Eberharter did not take issue with this observation.

At the hearings before the Senate Committee on Finance on H. R. 8300, 83rd Cong., 2d Sess., Part 4, pp. 1874–1879, another industry spokesman advanced essentially the same arguments made in the House hearings. Included, as before the House, was a specific suggestion that Section 3267 (b) (2) be amended so as to be identical with the "gambling device" definition of the Johnson Act directed against the "one-armed bandits".[10]

[10] Requests by industry spokesmen at both the House and Senate hearings to amend Section 3267 (b) (2) so as to make it identical

Despite these well-delineated and explicit requests of representatives of the pinball machine industry to amend the statute in the manner desired by them, Congress was not persuaded. Again, the statute was reenacted without change in the pertinent definition of "so-called 'slot' machines". 68A Stat. 531.[11] Since the administrative interpretation had been clearly and specifically pointed out to the congressional committees, this reenactment "bespeaks congressional approval". *Corn Products Refining Co.* v. *Commissioner*, 350 U. S. 46, 53; *Helvering* v. *Wimmill*, 305 U. S. 79, 83; *Bochm* v. *Commissioner*, 326 U. S. 287, 291–292; *Parker Pen Co.* v. *O'Day*, 234 F. 2d 607, 609–610 (C. A. 7).[12] See also *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, in which it was held that the War Production Board had authority under

---

with the "gambling device" definition of the Johnson Act disclose a desire on their part that paragraph (b) (2) include only the "one-armed bandits". Congress failed to follow this suggestion. From this it would seem reasonable to infer that the court below was ill-advised in using the Johnson Act definition (R. 117) as an analogy, even though we also take issue with the conclusion that these machines do not fall within the Johnson Act (see, *supra*, pp. 20, 21–22).

[11] The tax rate on gaming devices which had been increased to $250 in 1951 (65 Stat. 528) was retained.

[12] *Casey* v. *Sterling Cider Co.*, 294 Fed. 426 (C. A. 1), relied upon by the court below after stating that it could not assume Congress considered T. D. 5203 as stating the true construction of Section 4462 when it was shown that only of late had the regulation been followed (R. 118), is clearly distinguishable from the instant case. In *Casey* the regulation had been in effect only nine months when the new statute was enacted and there was no showing that it had been consistently enforced and acquiesced in. The court, moreover, did not regard the new statute as a reenactment of the old one without substantial change (294 Fed. at 429).

§ 124 (f) of the 1939 Internal Revenue Code to issue certificates that only a part of the cost of essential wartime improvements was necessary to the national defense. In considering the history of administrative regulations authorizing the practice, this Court stated (at p. 310):

> It appears that Congress kept close supervision over the certification program and the special authorization privilege. For example, § 124 was amended five times during the war; two of these amendments altered § 124 (f) itself in a manner which did not affect the language decisive to the present controversy. But no attempt was made to restrain the administrators from issuing certificates covering only a part of the cost of necessary facilities, *although it seems apparent that responsible committees of Congress were aware that § 124 (f) had been consistently interpreted and applied* by the certifying authorities as permitting them to issue such certifications. [Emphasis added.]

The legislative history of the statute thus discloses a consistent intent by Congress to regard pinball machines used for gambling purposes (such as respondent's machines) as subject to the higher tax ($250). It is significant that, when industry representatives sought an exemption from the higher tax for the penny-vending machines, Congress granted this relief, but refused to exempt pinball machines used for gambling purposes. It is a reasonable assumption that Congress was of the impression that the operators of the penny machines could not afford

to pay the higher tax, but that operators of pinball machines used for gambling purposes could well afford to and should do so.

The congressional purpose was correctly and consistently reflected in the Treasury regulation T. D. 5203 (*supra*, p. 4), in effect since 1942, making pinball machines subject to the higher tax as gaming devices if they are used for gambling purposes in redeeming "free plays" in cash, tokens, or merchandise, or in the granting of prizes for designated scores. The industry representatives were well aware of that interpretation and attempted to reverse that ruling by legislation. In each instance, however, Congress did not amend the "so-called 'slot' machines" definition in Section 4462 (a) (2) (*supra*, p. 2). It follows that, in all probability, Congress intended that pinball machines used for gambling purposes should pay the higher $250 tax under Section 4461 (2) (*supra*, p. 2). Certainly as to the type of machines here involved, which have features adapted only for gambling unrelated to the amusement aspects, it would be a negation of the congressional purpose to hold that they were not taxable as gambling devices.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
JOHN F. DAVIS,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MARCH 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957